

No. 13137

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TOSHIO KONDO,

Appellant,

vs.

DEAN ACHESON, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdiction.

The District Court has jurisdiction of the action under provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) as alleged in Paragraph III of plaintiff's Complaint [C. T. 2]; the necessary factual allegations of "denial of a right or privilege as a national of the United States * * * on the ground that he is not a national * * *" as required by said section, and the claim of residence as permanent within this judicial district, the "denial" being by the head of a department of the United States Government, are properly supplied and put in issue by the pleadings [C. T. 2, 5].

This Court has jurisdiction of the appeal under the provisions of 28 U. S. C. 1291 and 1294(1), there being no dispute as to the finality of the judgment of the District Court.

Statutes Involved.

Sections 401(c) and 402 of the Nationality Act of 1940 (8 U. S. C. 801(c), 802) provide in pertinent parts as follows:

“§801. *General means of losing United States Nationality.*

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(c) Entering, or serving in, the armed forces of a foreign state * * * if he has or acquires the nationality of such foreign state; * * *

“§802. *Presumption of expatriation.*

A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) * * * of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * and such presumption shall exist until overcome whether or not the individual has returned to the United States. * * *

Statement of the Case.

Appellant raises two principle questions in his brief herein:

(1) Does the evidence support the Findings of Fact [C. T. 18] and Judgment [C. T. 23] of the District Court that appellant's service in the Japanese Army, while a citizen of Japan, was voluntary and not the result of coercion?

This issue was raised by the pleadings [C. T. 3, 6].

(2) Is Section 401(c) of the Nationality Act of 1940 (8 U. S. C. 801(c)) unconstitutional as being in violation of the Fourteenth Amendment to the United States Constitution?

This issue was raised by the appellant by motion for new trial [C. T. 16].

Statement of Facts.

Appellant was born in the United States at Los Angeles, California, on May 29, 1926 [R. T. 6]. He had Japanese citizenship by registration in the Japanese Family History, and was consequently a dual citizen [R. T. 21, 39].

In December 1927, when appellant was about two years old, his parents, nationals of Japan, took him to Japan where he remained for twenty-two years [R. T. 6, 7], until his return to the United States for the purpose of this proceeding.

Appellant started Japanese primary school in 1933 [R. T. 16] and continued to school until graduating Middle school in March of 1945 [R. T. 9].

His education included military training [R. T. 18, 45], and he was taught to believe that the Japanese Emperor was supreme and that it was an honor to die for him [R. T. 39].

Appellant, in 1936, at the age of ten, knew about Japanese Military Conscription, that he would be subject to it [R. T. 38, 39]. Appellant at no time applied to an American Consulate for registration as an American citizen [R. T. 12, 22].

During the last six months of his schooling in Middle school, appellant was engaged in the making of anti-aircraft bullets at the Kure Naval Arsenal [R. T. 22, 25] and received his notice to report for a physical examination in January, 1945 [R. T. 28].

Appellant entered the Japanese Army in April, 1945, and served for a period of six months to September of that year [R. T. 11]. He made no protest upon being called into the army [R. T. 47], was promoted twice within three months following his induction [R. T. 33], and volunteered for officers training [R. T. 49, 50], being one of ten who passed the examination out of a class of twenty-five [R. T. 35].

After the war appellant returned to school for a short time, then worked [R. T. 41]. In July of 1949, appellant, for the first time, applied to the American Consul for a passport [R. T. 44].

ARGUMENT.

I.

Appellant Acted Voluntarily.

(a) Conditions Existing in Japan.

Appellant's argument in *Hamamoto v. Acheson*, No. 13136, now pending before this Court, is incorporated by reference into Appellant's Brief in this case, and is relied upon as the argument of this appellant. The Court should be advised, however, that certain exhibits referred to in said argument, particularly "Plaintiff's Exhibits 7, 8, 9," were excluded from evidence in the instant case, as were Exhibits 5, 6, 10, and 15. It is therefore presumed that the portions of appellant's argument referring to said excluded exhibits (in the *Hamamoto* case, Appellant's Brief at pages 28, 29, 30, 31 and 32) will be disregarded by this appellee.

However, that the District Court was fully aware of conditions existing in Japan at the time appellant entered the armed services and for some time prior thereto, is obvious from the District Judge's opinion reported at 98 Fed. Supp. 884. The Court states at page 885 [C. T. 9]:

"Plaintiff's counsel in his brief points to the conditions existing in Japan; that it was a totalitarian state ruled by the military authorities; that the people were generally in fear of the authorities and particularly in fear of the military authorities who exercised power over the entire country including the schools where military training was an integral part of the curriculum; that the Japanese boy was subjected to fully organized military training 'including squad drill, target practice, bayonet fighting and the use of hand grenades and other implements of warfare'; that the Home Ministry controlled the in-

timate lives of the Japanese people from the 'cradle to the grave'; and 'In the course of 20 years, Japanese militarists had constructed effective machinery for controlling the speech thoughts and movements of the people.'

Unquestionably counsel presents, in general, an accurate description of conditions existing at the time the plaintiff entered the armed services and for some time prior thereto. Such conditions are typical of a totalitarian state. In effect, the plaintiff contends that one entering the armed services of such a government is not responsible for his actions."

Our own "Hells Kitchen" in New York has spawned both criminals and statesmen. This analogy is here given only for the purpose of demonstrating that "conditions" must be evaluted in the light of their impact, if any, *upon the individual*; and in particular, *upon this appellant*.

Can we blanket situations which revolve upon factual quotients and say that the holding of one case shall be the law of all cases arising from the same geographical location at or about the same period of time?

This Court, in *McGrath v. Abo*, 186 F. 2d 766, refused to accept such a proposition and required a showing of how "conditions" affected each individual.

And in *Acheson v. Kuniyuki*, 189 F. 2d 741, this Court applied the facts to the individual as it affected *her* acts, though the appellee (plaintiff in the court below), cited eleven district court cases—"in each of which a national of the United States who had voted * * * was found to have done so voluntarily."

As to the cases cited by the appellant on pages 25 and 26 of his brief, eight of them were cited to the court

below. The trial court has this to say of them at page 887 of the opinion [C. T. 15]:

“Plaintiff cites a number of cases decided by the District Courts in which the overt acts spelling expatriation were held to be involuntary and suggests, ‘There is no reason why the instant case should be differently decided.’ The questions involved in those cases, as in the instant case, were factual. The facts in each of the several cases are not identical. The trier of fact may not stray beyond the record in front of him in weighing the evidence, and the inferences to be drawn therefrom for the purpose of resolving conflicts.”

(b) Real Attachment to a Foreign Country.

While appellant has raised this point under his discussion of constitutionality, appellee chooses to discuss the point under the question of “coercion” since it is claimed to be a limitation on the voluntariness of appellant’s expatriating act. Appellant has here attempted to add further qualifications to Section 801(c). *Dos Reis v. Nicolls*, 161 F. 2d 860, has in effect added the word “voluntary” to the application of the acts of expatriation enumerated in Section 801. It has never stood for the requirement that “attachment to a foreign country” must be proved. This fiction is lifted bodily from the report of the President’s Cabinet Committee to Congress merely because it is cited in the *Dos Reis* case (*supra*) by the appellant. The language relied upon by the appellant as referring to “motive” or “intent” or “state of mind” clearly is de-

scriptive only of the inference to be drawn from the *acts* of the person, to-wit:

“* * * provisions in the code concerning loss of American nationality * * * are merely intended to deprive persons of American nationality when such persons, *by their own acts* * * * show that their real attachment is to the foreign country * * *” (Emphasis added.)

Other phrases such as “free and intelligent choice” and “offering his all in support of a foreign state” are likewise attempts to further limit the acts by circumscribing them with subjective motives and intent. The Supreme Court, however, in *United States v. Savorgnan*, 338 U. S. 491, at page 499 states:

“There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.”

This Court, in *Acheson v. Kuniyuki*, *supra*, cited the *Savorgnan* case as support for the following statement in the opinion of this Court at page 744:

“The fact, if it be a fact, that she did not intend to lose her nationality and did not know that she would lose it if she voted in these elections is immaterial.”

In the light of the record in this case, however, it is pointless to quibble over phraseology. It is unnecessary to do so when appellant's testimony in the Court below is examined. He was raised in Japan almost from birth.

He had no recollection of the United States [R. T. 37] and had never been back. He was taught to believe that the Emperor was supreme and that it was an honor to die for him [R. T. 39]. He entered the Japanese Army without protest, was promoted twice in three months, volunteered for officers training [R. T. 33, 47, 49]. The trial court in its opinion at page 887 [C. T. 13] says:

“* * * The history of his background considered with the zeal he displayed in his efforts to accomplish promotion in the Japanese Army, indicates he was more interested in being a ‘loyal son of Japan’ than preserving his status as a national of a country he had never seen after his infancy.”

Surely this is “real attachment to a foreign state” and “shown by his own acts.” And, can it not be said that he “offered his all in support of a foreign state?”

Before leaving proposition I under the main heading “Appellant Acted Voluntarily,” the attention of this Court is respectfully called to the statement of the trial court at page 885 [C. T. 9] which best sums up the argument under Appellee’s first main point:

“In support of his claim that his action was involuntary, plaintiff relies *solely* on the circumstances existing in Japan prior to the surrender of that country to the allied powers. *He does not offer an iota of evidence* to show that he in any way remonstrated against his induction or made any effort to avoid service in the Japanese Army. *On the contrary, his own testimony indicates complete cooperation with the Japanese authorities.*” (Emphasis supplied.)

II.

The Constitutional Question.

The facts of the instant case rob appellant's argument on the constitutional question of its virility. His first point is raised under letter "A" at page 8 of his brief, stating:

"United States Citizenship is not to be taken away or deemed forfeited *except in the clearest cases.*" (Emphasis supplied.)

As we read his later argument it would seem that he contends that it cannot be taken away or forfeited at all. However, since under this point a "clear case" is his measure, appellee submits, and the trial court has agreed, this case is clear.

Appellant then states "The burden of proof is upon the Government." The Government's burden of proof under the Nationality Act was sustained when appellant admitted service in the Japanese army, as alleged in his complaint [C. T. 3], the appellant then having Japanese nationality as required by Section 401(c) and having resided in Japan for more than six months [C. T. 2] and the presumption of Section 402 of the Nationality Act was raised.

The burden of going forward with evidence that would excuse the military service was then upon the appellant who recognized this burden by the allegations in paragraph V of his complaint raising the defense of "coercion" [C. T. 3]. This allegation was denied in appellee's answer [C. T. 6.]

Appellant's next point is raised under letter "B" at page 11 of his brief. It requires the showing of "real

attachment to a foreign country” and has been discussed and answered above by appellee.

Appellee has no argument with Appellant’s point “C” that the Section of the Act here in question applies only to voluntary conduct. This view has been adopted in all cases subsequent to the *Dos Reis* case (*supra*) dealing with Section 801 irrespective of the subsection concerned. However, the Third Circuit in adopting this view in *Doreau v. Marshall*, 170 F. 2d 721, 724, warns:

“On the other hand it is just as certain that the forsaking of American citizenship, *even in a difficult situation, as a matter of expediency*, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress.” (Emphasis supplied.)

“Knowledge of the consequences” has been determined by this Court and the Supreme Court whom it followed, as being immaterial. *Kuniyuki* and *Savorgnan* cases (*supra*).

“Free and intelligent choice” as raised by appellant was also raised in the case of *Cantoni v. Acheson*, 88 Fed. Supp. 576, and on very similar facts. There the plaintiff alleged that he did not know when he served in the Italian army that he was entitled to citizenship of the United States and hence such act was not freely and intelligently done. The Court rejected the theory.

Appellant relies finally upon the decision of the District Court in *Okimura v. Acheson*, 99 Fed. Supp. 587, holding that Congress may not condition the loss of citizenship on the doing of an act, other than undergoing the formal process of naturalization in a foreign state. This decision nullifies the considered judgment of Con-

gress as to the conditions under which a citizen of the United States by birth may lose his American nationality.

To a large extent, it invalidates the whole pattern established for dealing with problems of dual nationality and dual allegiance since the reasoning of the District Court would necessarily affect, not only the particular clause of the Nationality Act directly involved, but also all other clauses by which loss of nationality is made dependent on some act other than the process of naturalization.

The decision completely disregards the decisions of the Supreme Court which have implicitly or explicitly rejected the premises upon which the opinion rests. *Savorgnan v. United States*, *supra*; *Mackenzie v. Hare*, 239 U. S. 299; see also *Miranda v. Clark*, 180 F. 2d 257 (C. A. 9); *Ex parte Griffin*, 237 Fed. 445 (N. D. N. Y.).

Said District Court holds that a citizen by birth can lose his nationality only by going through the formal process of naturalization in a foreign state. That position was, however, rejected by the Supreme Court in *Mackenzie v. Hare*, *supra*, when it upheld the validity of Section 3 of the Act of 1907, providing that any American woman who married a foreigner should take the nationality of her husband. Referring to the absence of an express provision in the Constitution giving Congress the right to provide for loss of citizenship—a consideration relied on by the District Court in the *Okimura* case, *supra*—the Supreme Court said, in the *Mackenzie* case, at page 311:

“But there may be powers implied, necessary or incidental to the expressed powers. As a Government, the United States is invested with all the

attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries.”

The *Mackenzie* case also rejected the contention, implicit in said District Court’s opinion, that Congress cannot condition the loss of nationality on any act other than one evincing a subjective intent to renounce American citizenship. Referring to the claim that “no act of the legislature can denationalize a citizen without his concurrence,” the Supreme Court said, 239 U. S. at page 312:

“It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences.”

Appellee contends that the “notice of the consequences” above referred to is such legal notice as appears on the face of the act—the knowledge of the law that everyone is presumed to know.

In *Savorgnan v. United States*, 338 U. S. 491, the Supreme Court pointed out, at page 497, that

“Traditionally the United States has supported the right of expatriation as a natural and inherent right of all people, * * *

and further at page 499, that

“* * * the acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively.

There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.”

Nowhere in the opinion is there any intimation that the fixing of such objective conditions for loss of nationality is beyond the constitutional power of Congress.

In *Ex parte Griffin*, 237 Fed. 445 (N. D. N. Y.), where the act of expatriation relied on was the taking of an oath of foreign allegiance, the Court, referring to Section 2 of the 1907 Act, said at page 453:

“Conceded that a sovereign cannot discharge a subject from his allegiance and arbitrarily deprive him of his citizenship against his consent, except as a punishment for crime, and that Congress cannot abridge or enlarge the rights of citizens * * *; still the right of a citizen to expatriate himself exists * * * and the sovereign power, through Congress, may declare that the doing of certain acts, inconsistent with citizenship in the United States, shall constitute expatriation—loss of or renunciation of citizenship.”

In *Miranda v. Clark*, 180 F. 2d 257, this United States Court of Appeals for the Ninth Circuit held that Section 401(e) of the Nationality Act of 1940 (8 U. S. C. 801(e)), providing for loss of citizenship by voting in a political election in a foreign state, was constitutional. It ruled that the provisions of the statute “bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation.”

Conclusion.

The District Court in the instant case has applied the applicable presumptions and has resolved such conflict as the presumptions and inferences drawn from the facts in evidence may have created, which indeed, as the trier of fact, it was his duty to do.

Cohen v. C. I. R., 2 Cir., 148 F. 2d 336;

Elzig v. Gudwangen, 8 Cir., 91 F. 2d 434;

Gibson v. So. Pac. Co., 5 Cir., 67 F. 2d 758;

Quock Ting v. United States, 140 U. S. 417.

There is ample evidence to support the Findings of Fact and the Judgment. Appellee submits that the judgment should be affirmed.

Respectfully submitted,

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